

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRAVELERS CASUALTY AND SURETY COMPANY as
 Administrator for RELIANCE INSURANCE COMPANY,

Plaintiff,

vs.

: 07-CV-6915 (DLC)
ECF CASE

DORMITORY AUTHORITY – STATE OF NEW YORK,
 TDX CONSTRUCTION CORP. and KOHN PEDERSEN
 FOX ASSOCIATES, P.C.,

Defendants.

DORMITORY AUTHORITY OF THE STATE OF NEW YORK
 AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiffs,

vs.

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendant.

: **ANSWER OF**
LUMBERMENS
MUTUAL CASUALTY
COMPANY TO CROSS-
CLAIM OF
OHIO CASUALTY
INSURANCE
COMPANY d/b/a
OHIO CASUALTY
GROUP

TRATAROS CONSTRUCTION, INC. and TRAVELERS
 CASUALTY AND SURETY COMPANY,

Fourth-Party Plaintiffs,

vs.

CAROLINA CASUALTY INSURANCE COMPANY; BARTEC
 INDUSTRIES, INC.; DAYTON SUPERIOR SPECIALTY
 CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION;
 SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC;
 KEMPER CASUALTY INSURANCE COMPANY d/b/a KEMPER:
 INSURANCE COMPANY; GREAT AMERICAN INSURANCE
 COMPANY; NATIONAL UNION FIRE INSURANCE
 COMPANY OF PITTSBURGH, PA; UNITED STATES FIRE
 INSURANCE COMPANY; ALLIED WORLD ASSURANCE
 COMPANY (U.S.) INC. f/k/a COMMERCIAL UNDERWRITERS

INSURANCE COMPANY; ZURICH AMERICAN INSURANCE' :	:
COMPANY d/b/a ZURICH INSURANCE COMPANY; OHIO :	:
CASUALTY INSURANCE COMPANY d/b/a OHIO CASUALTY :	:
GROUP; HARLEYSVILLE MUTUAL INSURANCE COMPANY :	:
(a/k/a HARLEYSVILLE INSURANCE COMPANY); JOHN DOES :	:
1-20 and XYZ CORPS. 1-20,	:
	:
<u>Fourth-Party Defendants.</u>	:

Comes now Fourth-Party Defendant Lumbermens Mutual Casualty Company (“LMC”), improperly sued as Kemper Casualty Insurance Company d/b/a Kemper Insurance Company,¹ and for its Answer to the Cross-Claim of Ohio Casualty Insurance Company d/b/a Ohio Casualty Group states as follows:

FIRST COUNT

1. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 149 of the Answer to Fourth-Party Complaint of Trataros Construction, Inc. and Travelers Casualty & Surety Company on Behalf of Ohio Casualty Insurance Company d/b/a Ohio Casualty Group (“Ohio Casualty”). Further, LMC admits the First, Second, Fifth, Sixth, Seventh, Sixteenth, and Seventeenth Separate Defenses of the Answer of Ohio Casualty. In addition, LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Third, Fourth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Separate Defenses of the Answer of Ohio Casualty. Further, LMC admits the allegations contained in the Eighth Separate Defense that the sums for which the Fourth-Party plaintiffs seek indemnification may be precluded by public policy and/or by express provisions of law, and LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the Eighth Separate Defense of Ohio Casualty. Also, LMC

admits the allegations contained in the Eighteenth Separate Defense as to Crocetti, and LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in the Eighteenth Separate Defense of Ohio Casualty.

2. LMC admits that Ohio Casualty issued a policy of insurance to Bartec Industries. LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the First Count of the Cross-Claim.

3. The policy of insurance speaks for itself. To the extent that the allegations in paragraph 3 of the First Count of the Cross-Claim conflict with the policy's provisions, LMC denies them.

4. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the First Count of the Cross-Claim.

5. The referenced provisions of the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 5 of the First Count of the Cross-Claim conflict with the referenced provisions, LMC denies them.

6. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the First Count of the Cross-Claim.

7. The referenced exclusions in the Ohio Casualty policy speak for themselves. To the extent that the allegations in paragraph 7 of the First Count of the Cross-Claim conflict with the referenced exclusions, LMC denies them.

¹LMC is one of the Kemper Insurance Companies, and issued the insurance policy at issue in the Fourth-Party Complaint.

8. The referenced provisions in the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 8 of the First Count of the Cross-Claim conflict with the referenced provisions, LMC denies them.

9. The referenced provisions of the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 9 of the First Count of the Cross-Claim conflict with the referenced provisions, LMC denies them.

10. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the First Count of the Cross-Claim.

11. The referenced definitions of the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 11 of the First Count of the Cross-Claim conflict with the referenced definitions, LMC denies them.

12.-15. The referenced endorsements to the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraphs 12 through 15 of the First Count of the Cross-Claim conflict with the referenced endorsements, LMC denies them.

16.-19. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16 through 19 of the First Count of the Cross-Claim.

20. The referenced Conditions of the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 20 of the First Count of the Cross-Claim conflict with the referenced Conditions, LMC denies them. LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 20 of the First Count of the Cross-Claim.

21.-22. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 21 and 22 of the First Count of the Cross-Claim.

23. LMC denies the allegations contained in paragraph 23 of the First Count of the Cross-Claim.

24. LMC admits the allegations contained in paragraph 24 of the First Count of the Cross-Claim.

25. The referenced provisions of the Ohio Casualty commercial umbrella policy speak for themselves. To the extent that the allegations in paragraph 25 of the First Count of the Cross-Claim conflict with the referenced provisions, LMC denies them.

26. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the First Count of the Cross-Claim.

27. The referenced exclusions to the Ohio Casualty commercial umbrella policy speak for themselves. To the extent that the allegations in paragraph 27 of the First Count of the Cross-Claim conflict with the referenced exclusions, LMC denies them.

28. The referenced definitions of the Ohio Casualty commercial umbrella policy speak for themselves. To the extent that the allegations in paragraph 28 of the First Count of the Cross-Claim conflict with the referenced definitions, LMC denies them.

29. The referenced endorsement speaks for itself. To the extent that the allegations in paragraph 29 of the First Count of the Cross-Claim conflict with the referenced endorsement, LMC denies them.

30. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the First Count of the Cross-Claim.

WHEREFORE, Lumbermens Mutual Casualty Company demands judgment be entered in its favor and against Cross-Claimant Ohio Casualty, denying all relief sought by Ohio Casualty against LMC, including such other relief including attorneys' fees and costs as the Court may deem appropriate.

SECOND COUNT

1. LMC repeats and realleges each and every answer to paragraphs 1 through 30 of the First Count of the Cross-Claim as if fully set forth herein.
2. LMC admits that Ohio Casualty issued policies of insurance to G.M Crocetti, Inc. LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the Second Count of the Cross-Claim.
3. LMC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Second Count of the Cross-Claim.
4. The referenced provisions of the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 4 of the Second Count of the Cross-Claim conflict with the referenced provisions, LMC denies them.
5. LMC denies that there is no insurance coverage provided under the referenced Ohio Casualty policy of insurance. LMC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the Second Count of the Cross-Claim.
6. The referenced provision of the Ohio Casualty policy of insurance speaks for itself. To the extent that the allegations in paragraph 6 of the Cross-Claim conflict with the referenced provision, LMC denies them.

7. The referenced exclusions to the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 7 of the Second Count of the Cross-Claim conflict with the referenced exclusions, LMC denies them.

8. The referenced endorsement to the Ohio Casualty policy of insurance speaks for itself. To the extent that the allegations in paragraph 8 of the Second Count of the Cross-Claim conflict with the referenced endorsement, LMC denies them.

9. LMC denies the allegations contained in paragraph 9 of the Second Count of the Cross-Claim.

10. The referenced definitions to the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 10 of the Second Count of the Cross-Claim conflict with the referenced definitions, LMC denies them.

11. The referenced Conditions to the Ohio Casualty policy of insurance speak for themselves. To the extent that the allegations in paragraph 11 of the Second Count of the Cross-Claim conflict with the referenced Conditions, LMC denies them.

12. LMC denies that Ohio Casualty does not owe insurance coverage.

13. LMC admits that G.M. Crocetti, Inc. filed an Initial Disclosure and that the Initial Disclosure speaks for itself. To the extent that the allegations in paragraph 13 of the Second Count of the Cross-Claim conflict with the Initial Disclosure, LMC denies them.

WHEREFORE, LMC demands judgment be entered in its favor and against Cross-Claimant Ohio Casualty, denying all relief sought by Ohio Casualty against LMC, including such other relief including attorneys' fees and costs as the Court may deem appropriate.

Affirmative Defenses

**FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Cross-Claim fails to state a claim upon which relief can be granted against LMC.

**SECOND AFFIRMATIVE DEFENSE
(Trataros is Not an Insured)**

Trataros is not a named insured in the LMC Policy and Trataros is therefore not entitled to a defense or indemnification from LMC, and Ohio Casualty is therefore not entitled to indemnification, contribution, or subrogation from, or to have any judgment entered against, LMC.

**THIRD AFFIRMATIVE DEFENSE
(Bartec is Not an Insured)**

Bartec Industries, Inc. is not a named insured in the LMC Policy and Bartec Industries, Inc., the insured of Cross-Claimant, is not entitled to a defense or indemnification from LMC. Ohio Casualty is therefore not entitled to indemnification, contribution, or subrogation from, or to have any judgment entered against, LMC.

**FOURTH AFFIRMATIVE DEFENSE
(Trataros is Not an Additional Insured for Claims at Issue)**

The LMC Policy provides additional insured status where the Named Insured G.M. Crocetti, Inc. is required to provide insurance in a contract but only for liability arising from the named insured G.M. Crocetti, Inc.'s work for that party. Any liability of Trataros is the result of Trataros' conduct in insisting that Crocetti install terrazzo over Conflow over Crocetti's objections. Any liability of Trataros does not arise out of Crocetti's work but arises out of Trataros' decisions. Trataros is therefore not an additional insured under the LMC Policy for the terrazzo claims and Ohio Casualty is not entitled to indemnification, contribution or subrogation from, or to have any

judgment entered against, LMC.

FIFTH AFFIRMATIVE DEFENSE
(Bartec is Not an Additional Insured for Claims at Issue)

The LMC Policy provides additional insured status where the Named Insured G.M. Crocetti, Inc. is required to provide insurance in a contract but only for liability arising from the named insured G.M. Crocetti, Inc.'s work for that party. G.M. Crocetti, Inc. did not perform work for Bartec Industries, Inc. and therefore Bartec Industries, Inc. is not an additional insured under the LMC Policy for the Terrazzo claims and Ohio Casualty is not entitled to indemnification, contribution or subrogation from, or to have any judgment entered against, LMC.

SIXTH AFFIRMATIVE DEFENSE
(Lack of Occurrence)

The LMC Policy requires that a covered claim arise out of an "occurrence". Trataros ordered G.M. Crocetti, Inc., over Crocetti's objections, to install terrazzo flooring over Conflow, knowing that it would fail. As such, the claim does not constitute an "occurrence" and there is no duty to defend or indemnify Trataros under the LMC Policy, and therefore Ohio Casualty is not entitled to indemnification, contribution or subrogation from, or to have any judgment entered against, LMC.

SEVENTH AFFIRMATIVE DEFENSE
(Your Work Exclusion Bars Any Coverage)

The LMC Policy contains an Exclusion titled "Your Work" which excludes coverage for any property damage that results from the work conducted by Trataros. As such, there is no coverage for any claim by Trataros against LMC and Ohio Casualty is not entitled to indemnification, contribution or subrogation from, or to have any judgment entered against, LMC.

EIGHTH AFFIRMATIVE DEFENSE
(Failure to Provide Proper Notice)

The LMC Policy contains a notice Condition that requires notification of an occurrence as soon as practicable and immediate notification of an offense that may result in a claim. The notice Condition also requires immediate notice of a claim or suit. Trataros failed to comply with this Condition and therefore there is no duty to defend or indemnify Trataros under the LMC Policy, and Ohio Casualty is not entitled to indemnification, contribution or subrogation from, or to have any judgment entered against, LMC.

**NINTH AFFIRMATIVE DEFENSE
(Other Insurance)**

The LMC Policy contains provisions that provide that if there is any other collectible insurance available to an insured, the LMC Policy will be excess of the other collectible insurance.

Cross-Claimant's claims are barred in whole or in part to the extent that there is other collectible insurance available to the insured.

**TENTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Cross-Claim fails to allege facts sufficient to constitute a claim against LMC.

**ELEVENTH AFFIRMATIVE DEFENSE
(Other Defenses)**

LMC reserves the right to amend its Answer by way of adding affirmative defenses, counterclaims, cross-claims, or by instituting third party actions as additional facts are obtained through investigation and discovery.

WHEREFORE, LMC prays that Cross-Claimant take nothing by its Cross-Claim; that LMC be dismissed with prejudice and awarded fees and costs incurred in defending this suit; and that this Court enter a declaration that LMC is not obligated to provide insurance coverage for Fourth-Party Plaintiffs or any other party, and for any further relief that this Court deems equitable and just.

DATED: January 14, 2008

By: s/ Michael S. Miller
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DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury, that on January 14, 2008, he caused a true copy of the foregoing Answer, etc. to be served via electronic filing and first class mail upon counsel for the various parties as follows:

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DATED: January 14, 2008

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